

1 stand and say they were stolen, but -- and under the  
2 circumstances I would ask the Court to reconsider having those  
3 documents returned to the Court or the U.S. Attorney's Office  
4 so they can be made use of.

5 THE COURT: Mr. Lerner, do you want to be heard on  
6 that?

7 MR. LERNER: Well, I have no objection to Mr. Doe  
8 taking the stand.

9 THE COURT: I'm not referring to Mr. Doe taking the  
10 stand. The question was an application to the Court to direct  
11 that those documents be returned to the United States  
12 Attorney's Office and to the Court to the extent that those  
13 documents were obtained from a file which was marked under  
14 seal and they were sealed documents which were not to be  
15 disclosed absent a court order disclosing them.

16 MR. LERNER: They were obtained lawfully from  
17 Mr. Bernstein, therefore, we object.

18 MS. MOORE: Your Honor, Mr. Bernstein did not obtain  
19 them lawfully from my client.

20 THE COURT: Excuse me, Ms. Moore. Stop the back and  
21 forth colloquy.

22 With respect to that I'll reserve. I will entertain  
23 a memorandum with respect to that and I will give both parties  
24 an opportunity to do that.

25 With respect to the presentence report I have

1 absolutely no hesitation in enjoining any further  
2 dissemination and I'll direct the presentence report to be  
3 returned. To the extent that you have that in your  
4 possession, return it immediately --

5 THE WITNESS: Absolutely.

6 THE COURT: -- to the United States Attorney's  
7 Office.

8 With respect to the cooperation agreement, proffer  
9 agreement and any other document which you know was obtained  
10 from a file which was marked under seal, I will entertain a  
11 memorandum with respect to that and I'll reserve.

12 Are we finished? Why don't you have Mr. Doe  
13 testify. I think that issue is very, very much at the core of  
14 this proceeding.

15 In view of the fact it is five after one, why don't  
16 we recess for lunch and resume at two o'clock.

17 Two o'clock.

18 (Lunch recess.)

19

20

21

22

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25

1                   A F T E R N O O N   S E S S I O N .

2                   THE COURT:   Is everybody present?

3                   MR. LERNER:   Your Honor, with the Court's permission  
4 Mr. Oberlander has a correction to make in his testimony and  
5 would he be permitted to correct something?

6                   THE COURT:   By all means.

7                   THE WITNESS:   Thank you.

8                   THE COURT:   What would you like to correct,  
9 Mr. Oberlander?

10                  THE WITNESS:   I don't recall the phrasing of the  
11 exact question, but Ms. Moore asked me what were the grounds  
12 that I put in my motion to seal when I went in front of Judge  
13 Wood and I believe she asked me on one or two occasions did I  
14 include in my motion notice that there were documents that she  
15 says are sealed. We all understand what she means. And the  
16 answer I gave was that no, I didn't, or I don't recall, and  
17 that's correct, but it is incomplete, because I refreshed my  
18 memory and what actually happened when I went to Judge Wood's  
19 chambers was that her law clerk first read everything and then  
20 he came out and asked me to show him the complaint and I  
21 generally did. Then he took the petition in. Judge Wood came  
22 back awhile later and said she wants to see the complaint and  
23 I picked it up and showed it to him and I said would you  
24 please make sure and tell Judge Wood this is a RICO case and  
25 that there are allegations of extreme criminal behavior here

1 and that there are documents in here relating to plea  
2 agreements. I don't remember the exact phrase I used, but it  
3 wasn't in the moving papers, but it was the equivalent of an  
4 oral statement as to the law clerk. I didn't want to mislead  
5 the Court.

6 My complete answer is the written moving papers did  
7 not include to my recollection that -- one of the bases for  
8 the request to seal was that there was a proffer or a  
9 cooperation agreement or PSR, but it was my oral request that  
10 the clerk convey to her such similar documents were there and  
11 she should take that into her determination. That was it.  
12 That's the only correction.

13 THE COURT: Did you want to inquire on that,  
14 Ms. Moore?

15 MS. MOORE: No, your Honor.

16 THE COURT: Are you ready? Are you calling Mr. Doe?

17 MS. MOORE: I am, your Honor.

18 J O H N D O E , called as the witness herein, having  
19 been first duly sworn/affirmed, testified as follows:

20 THE CLERK: Would you please state and spell your  
21 name for the record.

22 THE WITNESS: John Doe, J-o-h-n D-o-e.

23 THE COURT: Sir, be seated. Go ahead, Ms. Moore.

24 DIRECT EXAMINATION

25 BY MS. MOORE:



Doe-direct/Moore

- 1 Q. Mr. Doe, did you ever keep any documents in your office  
2 that were part of a sealed file at Eastern District of New  
3 York, a criminal case captioned 98-CR-1101?
- 4 A. Yes, I did.
- 5 Q. And did you keep them in a file?
- 6 A. Yes, I did.
- 7 Q. Was that file marked in any way?
- 8 A. Yes, it was.
- 9 Q. How was it marked?
- 10 A. Personal and confidential.
- 11 Q. Where did you keep that file in your office?
- 12 A. Bottom left-hand drawer of my desk.
- 13 Q. Did you keep it locked?
- 14 A. Most of the time, yes.
- 15 Q. Were there ever times it was not locked?
- 16 A. Yes, there were.
- 17 Q. Like when?
- 18 A. During the day, if I had to go to the restroom or if I  
19 ran to a meeting in the next office or if I stepped out for  
20 lunch. I locked my desk when I went home at night, but  
21 sometimes during the day it would be unlocked.
- 22 Q. Did that file contain documents along the lines of  
23 proffer agreements, cooperation agreement, presentence report  
24 information, criminal complaint?
- 25 A. Yes, it did. I did not remember how many of the items

Doe-direct/Moore

1 you just mentioned were in there. It is possible all of them.

2 Q. Way did you keep that file in your office?

3 A. I was constantly speaking to my attorneys about my case  
4 and I needed to have readily available files regarding that  
5 case.

6 Q. Did you also keep that file at your home?

7 A. No, I did not.

8 Q. Why not?

9 A. I didn't want my family to see it.

10 Q. Do you have children, Mr. Doe?

11 A. Yes, I do. I have three children.

12 Q. Mr. Doe, who is Josh Bernstein?

13 A. Josh Bernstein was an analyst who worked at Bayrock for  
14 awhile. I don't remember the exact dates of employment.

15 Q. Was he fired?

16 A. Yes, he was.

17 Q. Why?

18 A. He kept taking time off and kept submitting personal  
19 expenses as business related expenses and eventually the  
20 decision was made to terminate him.

21 Q. Did you ever give Mr. Bernstein the file you just  
22 described marked personal and confidential or any of the  
23 documents in it that related to the criminal case  
24 98-CR-1101?

25 A. Absolutely not.

Doe-direct/Moore

1 Q. Is there any reason you would have given Mr. Bernstein,  
2 an analyst at Bayrock, those documents?

3 A. Absolutely not.

4 Q. Did you consider those documents to be highly sensitive  
5 and personal?

6 A. Highly sensitive, personal and dangerous to myself and my  
7 family.

8 MS. MOORE: No further questions, your Honor.

9 THE COURT: Mr. Lerner, do you wish to inquire?

10 MR. LERNER: With the Court's permission,  
11 Mr. Stamoulis is going to question the witness.

12 THE COURT: Sure.

13 CROSS-EXAMINATION

14 BY MR. STAMOULIS:

15 Q. Good afternoon, Mr. Doe. My name is Stam Stamoulis.

16 I'm counsel to Jody Kriss and Michael Ejekam.

17 Do you know who Michael Ejekam is?

18 A. Yes, I do.

19 Q. What do you understand to be his relationship with  
20 Bayrock?

21 A. He's a friend of Jody's from college and he was sourcing  
22 -- looking for deals to introduce to Bayrock.

23 THE COURT: Mr. Stamoulis, just to avoid any  
24 objections which are going to be made, confine yourself to the  
25 direct, okay. The only issue on direct examination is whether

Doe-cross/Stamoulis

1 or not Mr. Doe had given consent to anybody specifically.

2 MR. STAMOULIS: Yes, your Honor. I would like to  
3 inquire of the witness whether my two clients were ever given  
4 the file.

5 THE COURT: Okay. I anticipated, I saw Ms. Moore  
6 about to get up and, so, I was anticipating what might be  
7 unnecessary colloquy.

8 Q. In your involvement with Mr. Ejekam, whatever that may  
9 be, at Bayrock, did you ever have occasion to give him any  
10 aspect of that file that you described as being kept in your  
11 desk draw?

12 A. No.

13 Q. In your involvement with Mr. Kriss while at Bayrock, did  
14 you ever have occasion to give Mr. Kriss any aspect of that  
15 file that was kept in your desk drawer?

16 A. No.

17 Q. Did Mr. Ejekam or Mr. Kriss give you any reason to  
18 believe that they personally acquired the contents of that  
19 file at any time?

20 A. No.

21 Q. Did you ever inquire -- let me take a step back.

22 You said that Mr. Bernstein was an analyst?

23 A. I believe that was his official title.

24 Q. What did his job responsibilities entail?

25 A. Generally, to do the financial modeling when we would



Doe-cross/Stamoulis

1 look for a deal. He would do the financial modeling on  
2 certain things, he would do some follow-up phone calls,  
3 follow-up letters, things of that nature. It was a real  
4 estate development shop and basically assistance to myself  
5 or Jody Kriss or any of the other people employed at Bay  
6 Rock.

7 Q. Did any aspect of his responsibilities ever relate to  
8 maintenance of data of Bayrock files?

9 A. He was probably the most technologically advanced of the  
10 group, so from time to time I'm sure I've asked and I'm sure  
11 members of the firm had asked him to do something to do with  
12 their Blackberries or something to do with emails or  
13 computers, yes.

14 Q. Do you remember the nature of any of those somethings  
15 that you asked Mr. Bernstein to deal with with regard to  
16 data?

17 A. I was deposed in a case where Mr. Bernstein is currently  
18 suing Bayrock in White Plains and that same question was asked  
19 of me and I believe we're speaking of the hard drive. If you  
20 could clarify? I may have asked him other things from time to  
21 time. If you'll refresh as to that?

22 Q. I'm not there yet. But, generally speaking, what was the  
23 nature of the -- the specific nature of the projects that  
24 Mr. Bernstein would be requested to do with regard to data at  
25 Bayrock?

Doe-cross/Stamoulis

1 A. In regard to a specific request I made of him we have a  
2 server where all the emails and everybody's correspondence and  
3 things of that -- files are stored. Files are stored, things  
4 of that nature, and I asked Josh Bernstein to buy a large  
5 backup hard drive to make a backup of our files in case of a  
6 crash, in case of a systems crash, so we could have a copy of  
7 our files.

8 Q. Did you ask Mr. Bernstein to keep that hard drive at his  
9 home?

10 A. Absolutely not. In fact, I -- when Mr. Bernstein was  
11 being asked to leave, I specifically remember myself and  
12 Julius Schwartz asking him to return files and what later  
13 came to be known is that there was a hard drive he never  
14 returned.

15 Q. Do you recall Mr. Bernstein purchasing that hard drive  
16 out of his own personal funds?

17 A. I don't remember the details. I doubt Mr. Bernstein paid  
18 for his own -- with his own funds. He may have paid for it  
19 and got reimbursed. I'm sure he didn't pay for it from his  
20 own funds without reimbursement. Mr. Bernstein would like  
21 reimbursement for everything, including water.

22 Q. Do you know whether indeed he was reimbursed for  
23 purchasing the external hard drive?

24 MS. MOORE: Objection.

25 THE COURT: You can answer.

Doe-cross/Stamoulis

1 A. I'm not sure. I don't remember.

2 Q. These documents you maintained in your desk?

3 A. Yes.

4 Q. Did you ever have an electronic version of those  
5 documents in your possession at any time?

6 A. I may have had an electronic version of those documents.  
7 My previous attorney in my case lived in Florida and it is  
8 possible he emailed me or I emailed him those documents with  
9 the caveat that obviously any communication between me and him  
10 was always marked privileged and confidential. It was between  
11 me and my attorney and had nothing to do with Bayrock or any  
12 type of real estate related deals.

13 Q. Is it possible those electronic versions of the documents  
14 made it onto the email server you asked Mr. Bernstein to copy  
15 though this hard drive?

16 A. Possible.

17 Q. It is your sworn testimony that you did not ask  
18 Mr. Bernstein to keep personal possession of that hard drive  
19 and maintain it at his home for safekeeping?

20 A. I don't believe I ever asked him to keep it at his home  
21 for safekeeping. I remember asking him to make a hard drive  
22 backup and give it to me, if anything, not to keep for  
23 himself.

24 MR. STAMOULIS: I have no further questions, your  
25 Honor.

Doe-cross/Lerner

1 THE COURT: Thank you. Mr. Lerner.

2 CROSS-EXAMINATION

3 BY MR. LERNER:

4 Q. Mr. Doe, you have no reason to believe that Mr. Bernstein  
5 told Mr. Oberlander that he stole documents from you, do you?

6 A. I'm sorry, I don't understand the question.

7 Q. Do you have any reason to believe Mr. Bernstein told  
8 Mr. Oberlander that those documents were stolen?

9 A. I don't know what he said to Mr. Oberlander.

10 Q. Now --

11 A. I'm sorry, no, I actually disagree with that. I was  
12 shown the transcript of -- Mr. Bernstein's transcript from  
13 when he was deposed and he actually stated there, and  
14 Mr. Oberlander was his attorney there or was sitting in on all  
15 of his depositions where Mr. Bernstein said that he took  
16 thousands of documents and brought them home. Documents, not  
17 emails or servers. Physical documents he claimed he took and  
18 brought home with him and kept there.

19 Mr. Oberlander should have easily understood he  
20 wasn't asked to use his apartment as an off-site storage  
21 facility for Bayrock. Yes, he should have understood they  
22 were stolen by Mr. Bernstein.

23 Q. Aren't there emails from you to Mr. Bernstein discussing  
24 him holding onto the documents at your request?

25 A. I don't remember. I don't remember having those emails



Doe-cross/Lerner

1 back and forth with Mr. Bernstein.

2 Q. You would be surprised if there were such emails from  
3 you?

4 A. Depending on what they said. I've asked Josh Bernstein  
5 to make a backup. I've asked Josh Bernstein. There were many  
6 times he held various documents in his possession and his  
7 office. He was an analyst. I have never asked him to hold  
8 personal documents of mine in his possession and I would be  
9 extremely surprised if there was any emails or correspondence  
10 between me and Mr. Bernstein asking him to hold my personal  
11 privileged court documents. Yes, I would be very surprised.

12 Q. You said Mr. Bernstein is an analyst. Wasn't his job  
13 description to be a techie, somebody whose responsibility it  
14 was to maintain backups?

15 A. He did a bunch of tech related stuff around the office  
16 from time to time. He was the most technically capable.

17 Q. At your direction?

18 A. Either mine, his own or somebody else's direction.

19 Q. Among the tasks that you directed him to undertake was  
20 backing up emails and hard drives; isn't that correct?

21 A. I asked him to buy a large hard drive and back up our  
22 server which had a whole bunch of files on them, including  
23 emails, yes.

24 Q. You asked him to keep that backup drive at his home;  
25 isn't that correct?

Doe-cross/Lerner

1 A. I don't remember asking him to keep it at his home.

2 I remember when he was leaving I asked him to return  
3 everything.

4 Q. If you asked him, you understood he didn't have it on the  
5 premises; isn't that correct?

6 A. I didn't know what he has. He had an office. He had  
7 things in his office and I don't know where he kept most of  
8 those things.

9 Q. You don't know if he had a backup hard drive in his  
10 office versus at his home?

11 A. No, I didn't. He may have had it at his home or in the  
12 office. I don't remember which specifically. I remember  
13 Julius Schwartz specifically asking him to return everything  
14 that was work related. That was when he was terminated.

15 Q. Can you describe for us your office? How is it locked?  
16 Is it a corner office? If someone were to go into that office  
17 during the daytime, would that person be seen by others?

18 A. Not necessarily. It was -- if the door was closed you  
19 wouldn't know who was inside.

20 Q. Does it have windows, external windows --

21 A. No.

22 Q. -- so one side could be seen from a secretarial station?

23 A. No. Door and wall.

24 Q. So, you testified that you kept your office locked at  
25 night.

Doe-cross/Lerner

1 A. I kept my desk, not my office, because cleaning staff  
2 would come onto the premises after we were all done.

3 Q. So, if the documents were stolen, they were stolen during  
4 the daytime; is that your testimony?

5 A. I wouldn't know when they were stolen, if they were  
6 stolen. I know I didn't hand it to him in any way, shape or  
7 form.

8 Q. It could have been on an email server; isn't that  
9 correct?

10 A. It is possible, but I'm not 100 percent sure.

11 Q. He was directed by you to keep backups of emails; isn't  
12 that correct?

13 A. He was directed to make a backup for me, not keep them.

14 Q. It was not within his job description for which he was  
15 hired to keep backups; isn't that correct?

16 A. I'm sorry. No, it was actually in his job description to  
17 assist and help the members of Bayrock and the requests they  
18 made of him which may have been whatever request they were  
19 making of him. In fact, many of the things he was creating  
20 were in electronic form, so there may have been a time when he  
21 was asked to do something in a tech capacity, yes.

22 Q. You just referred to yourself as a member of Bayrock?

23 A. I referred to myself -- yes, I was.

24 MS. MOORE: Objection, your Honor.

25 THE COURT: Overruled.

Doe-cross/Lerner

1 Q. Please clarify, were you an owner of Bayrock?

2 A. No.

3 Q. What did you understand yourself to be when you referred  
4 to yourself as a member of Bayrock?

5 A. A member is one of the people who was at the firm.

6 Q. Were you a partner?

7 A. I was a partner in deals, yes.

8 Q. What was the purpose of putting your personal emails on  
9 the email of Bayrock; why did you do that?

10 A. I don't believe I did, but in the course of sending and  
11 receiving hundreds of emails that most people do in a week, is  
12 it possible something may have made it in of a personal  
13 nature? Of course it is possible. Was it my habit to use  
14 Bayrock as my personal email? No, it wasn't, but it is  
15 possible it made it in there.

16 Again, I don't know the specifics. I don't  
17 understand the specifics that you're asking about, but, yes,  
18 it is possible.

19 Q. Do you know how to use a scanner?

20 A. Yes, I do.

21 Q. When you said you had these documents and referring to  
22 the purportedly sealed and confidential documents --

23 A. I didn't say they were sealed and confidential. I said  
24 the folder was marked personal and confidential.

25 Q. Did you scan them in yourself or have someone else scan



Doe-cross/Lerner

1 them in?

2 A. What do you mean?

3 Q. You said you have them in electronic form?

4 A. I didn't say -- I said may. You said did you have them  
5 in electronic form, or Mr. Stamoulis asked. I said they may  
6 have been. My attorney was in Florida at the time and we may  
7 have been communicating electrically. It is possible. I will  
8 tell you I did not scan them in nor did I have anyone scan  
9 them in. If there was an electronic and written form, it  
10 would have been from me printing them from an electronic form  
11 but never scanning them into a scanner.

12 Q. Why didn't you keep them in a locked safe?

13 A. I did not have a safe. I had a desk that was locked and  
14 I believed that my desk was my desk and had personal things in  
15 that desk. I had pictures of my children which I believe  
16 belong to me. I kept my desk locked as often as possible, so  
17 I didn't realize I had the need of a safe, especially in a  
18 small office where pretty much everybody was very friendly.  
19 It wasn't a large corporation with hundreds of people running  
20 around. I didn't think there was a need for a safe.

21 MR. LERNER: Thank you. No further questions.

22 REDIRECT EXAMINATION

23 BY MS. MOORE:

24 Q. Mr. Doe, earlier today during the proceeding Mr. Lerner  
25 represented in court that you had spoken to Mr. Bernstein and

Doe-direct/Moore

1 Mr. Bernstein had told him that these documents were part of  
2 several disks that you had given him.

3 Did you ever give Mr. Josh Bernstein several disks  
4 that contained these documents?

5 A. I have never given Josh Bernstein disks, written  
6 documents, electronic forms of anything to do with my case,  
7 anything to do with the personal nature of my life, especially  
8 things that I was afraid of, especially items and paperwork  
9 which I believed to be very, very dangerous to my life and the  
10 life of my children, my wife and my family.

11 Mr. Bernstein was one of amongst a few people working  
12 at the firm and clearly he would be second-to-last person in  
13 my life who I would give copies of documents like that to.

14 MS. MOORE: No further questions.

15 THE COURT: Anything further?

16 (No response.)

17 THE COURT: Thank you. You're excused.

18 Ms. Moore, do you have anything further?

19 MS. MOORE: Your Honor, I believe respondent Jody  
20 Kriss is here. I would like to inquire of him if he's given  
21 the documents to anyone else or knows anyone else may have  
22 them.

23 MR. STAMOULIS: No objection, your Honor.

24 THE COURT: Ms. Moore, it is your case.

25 J O D Y K R I S S , called as the witness

1 herein, having been first duly sworn/affirmed, testified as  
2 follows:

3 THE CLERK: Would you please state and spell your  
4 name for the record.

5 THE WITNESS: Jody Kriss, K-r-i-s-s.

6 THE COURT: Is that J-o-d-y?

7 THE WITNESS: Yes.

8 DIRECT EXAMINATION

9 BY MS. MOORE:

10 Q. Mr. Kriss, you've heard us referring to a number of  
11 documents, including proffer agreements, a cooperation  
12 agreement and a presentence report that were attached to a  
13 version of a complaint that was emailed to your father on May  
14 12th.

15 Are you familiar with this document?

16 A. Yes.

17 Q. When did you first see those documents?

18 A. In connection with Mr. Oberlander sent them to me prior  
19 to verifying the complaint.

20 Q. Was that roughly early May or --

21 A. Sounds right.

22 Q. Have you provided those documents to anyone else?

23 A. No.

24 Q. Are you aware of anyone else who is in possession of  
25 those documents beyond the individuals that Mr. Oberlander

Kriss-direct/Moore

1 mentioned earlier today?

2 A. I don't think so.

3 Q. Earlier Mr. Oberlander testified that the statement in  
4 the complaint that those documents were sealed was your  
5 statement, not his. You didn't draft that complaint I  
6 realize, but you did verify it.

7 Did you know at the time the complaint was filed that  
8 those documents were sealed?

9 A. No.

10 Q. Why did you verify a complaint that said they were sealed  
11 if you had not in fact known that they were?

12 MR. STAMOULIS: Objection, your Honor.

13 THE COURT: Overruled.

14 A. Same answer Mr. Oberlander gave. I read about it, heard  
15 about it, but didn't -- never saw anything that said that they  
16 were.

17 THE COURT: Speak into the microphone, please.

18 A. Same answer Mr. Oberlander gave that I heard about it,  
19 read about it, but hadn't personally seen anything to say they  
20 were.

21 Q. So, you had no personal knowledge they were sealed, but  
22 you believed they were sealed?

23 A. I think so.

24 MS. MOORE: No further questions, your Honor.

25 MR. STAMOULIS: No follow-up, your Honor.



1 THE COURT: Mr. Lerner?

2 MR. LERNER: No questions, your Honor.

3 THE COURT: You're excused. Thank you.

4 Anything further?

5 MS. MOORE: Your Honor, I have been working with

6 Mr. Stamoulis on obtaining an affidavit from his client who's

7 in Africa. I believe once I have the sworn affidavit that

8 states his other client never saw the version of the

9 complaint, never saw the attachments and never possessed them

10 and is not able to disseminate them any further and did not

11 know they were sealed, I believe there will be no further need

12 for his client's testimony.

13 His client is in Africa. I'm waiting to get the

14 affidavit which I believe is on its way from Africa.

15 MR. STAMOULIS: We sent it yesterday. It is the sum

16 and substance. He will sign it. It is just a matter of

17 logistically getting it back.

18 MS. MOORE: Your Honor, my only other application is

19 I would ask the TRO remain in place until we can file some

20 post-hearing briefs.

21 I would also ask the TRO be extended to two other

22 documents that are under seal in this District, the criminal

23 complaint Mr. Oberlander testified he obtained and what I

24 believe is a draft copy of an information that was also in

25 Mr. Doe's personal files.

1 I would further ask that my client's name, John Doe,  
2 or any reference to him as John or Doe be replaced with John  
3 Doe in this transcript and we would like an opportunity,  
4 obviously, to brief our further application for an order  
5 directing the return of all the documents that were taken from  
6 Mr. Doe's personal files and an injunction preventing further  
7 use and dissemination of the documents and the information  
8 contained therein.

9 MR. LERNER: We have no objection to continuance of  
10 the TRO. I think the Court already ruled on the PSR, so now  
11 we're just discussing the cooperation agreement and proffer  
12 agreement which are the subject of this order to show cause.  
13 Subject to further briefing we will -- and the other documents  
14 referred to by Ms. Moore, we would address these in further  
15 briefing. Of course, pending on the determination of the  
16 Court, we'll not disseminate these documents in any way.

17 I would also like an opportunity -- your Honor, I  
18 referred to in questioning Mr. Doe, I referred to some  
19 emails. I would like an opportunity to supplement these  
20 briefings with emails that are referred to. I don't have them  
21 on hand, but I would ask for the opportunity to just submit  
22 them to the Court.

23 MS. MOORE: No objection to that, your Honor. And  
24 one other thing, your Honor --

25 THE COURT: Excuse me. These are emails from Mr. Doe

1 to Mr. Bernstein.

2 MS. MOORE: Your Honor, to the extent that we're  
3 asking the TRO be extended to the two other documents in the  
4 complaint and the information, we've had trouble serving  
5 Mr. Josh Bernstein. We would ask to the extent respondents  
6 have access to him, they let him know the order has been  
7 extended to those documents as well.

8 MR. LERNER: I have access to Mr. Arnold Bernstein  
9 via email. I think I also have access -- I think the email  
10 that Mr. Arnold Bernstein sent to me may have John Bernstein  
11 CC'ed. That's how I could contact him.

12 If the Court wishes to enter an order directing he be  
13 served or that I disclose the email address, I'll do that.

14 THE COURT: By all means.

15 Anything further?

16 MS. MOORE: No.

17 THE COURT: Does anybody want to be heard further  
18 with respect to what has transpired here this morning and part  
19 of the afternoon?

20 MS. MOORE: I do have one further inquiry. As the  
21 Court knows, there was a cross motion to be able to obtain the  
22 affidavit of Mr. Bernstein. I'm assuming no such affidavit is  
23 going to be forthcoming and there will be no evidence from  
24 Mr. Bernstein.

25 MR. LERNER: As I indicated, I spoke with



1 Mr. Bernstein on the telephone. I communicated by Arnold  
2 Bernstein and was told by Arnold Bernstein that Joshua  
3 Bernstein isn't going to cooperate and he's represented by  
4 counsel. I assumed that meant he was represented by Arnold  
5 Bernstein. If I was mistaken in that regard, that would just  
6 be cleared up I suppose when I give over Mr. Josh Bernstein's  
7 email address to Ms. Moore.

8 THE COURT: Anything else?

9 MS. MOORE: No, your Honor.

10 THE COURT: Just so we're clear as to what I would  
11 like to have some post-hearing briefs submitted on, I've ruled  
12 with respect to the presentence report. With respect to the  
13 other documents which were part of a file that was marked  
14 sealed that was pursuant to a court order, the first question  
15 is whether that order is on its face clear to the extent that  
16 it says -- I'm sorry, I don't have the sealing envelope in  
17 front of me -- maybe I do. Document placed in a sealed  
18 envelope which provides it is ordered sealed and placed in the  
19 Clerk's office may not be unsealed unless ordered by the  
20 Court. Whether that order is an order which is clear enough  
21 on its face with respect to documents which are sealed would  
22 be enough to inform anybody coming into possession of such a  
23 document that it is what it purports to be, namely, a sealed  
24 document conveying with a very clear message that it is not to  
25 be for public or general disclosure.



1           To the extent there's some question as to whether it  
2   is an in rem or in personam order, I think the law is pretty  
3   clear that an order of the Court, assuming one is aware of the  
4   fact or should be aware of the fact that an order of the Court  
5   has been issued, I believe there's authority for the  
6   proposition that orders of the Court are to be obeyed and are  
7   disobeyed at one's risk. I think that is the essence of civil  
8   disobedience which needs no further elaboration. That's a  
9   matter for post-hearing briefing.

10           Also, the extent to which the Court does have some  
11   authority to enjoin the dissemination of documents such as  
12   cooperation agreements, proffer agreements is the language of  
13   that Southern District informational cite that says caution  
14   should be exercised, not a sufficient basis upon which one may  
15   enjoin for information regarding a person's cooperation with  
16   the government, and the purpose of not disseminating or  
17   exercising caution need not be elaborated on.

18           If you want a briefing schedule, I will be happy to  
19   provide one. Give me an indication as to how much time you  
20   think you need.

21           MS. MOORE: One week, your Honor.

22           THE COURT: Mr. Lerner.

23           MR. LERNER: We'll need additional time. Can we  
24   have two weeks to respond?

25           MS. MOORE: Will there be simultaneous briefs, your

1 Honor?

2 THE COURT: No. I prefer you can submit your brief,  
3 Mr. Lerner will be given an opportunity to reply. I will give  
4 him one week to respond. I don't think there will be anything  
5 to reply to.

6 Mr. Stamoulis, I don't think that you have a dog in  
7 this fight.

8 MR. STAMOULIS: Happily not, your Honor.

9 THE COURT: All right.

10 MS. MOORE: Your Honor, if we could just receive the  
11 additional email you intended to submit to the Court so we  
12 have it.

13 MR. LERNER: Sure.

14 THE COURT: All right. I suppose a collateral  
15 question --

16 MR. LERNER: My client wishes to know whether these  
17 proceedings today are sealed?

18 MS. MOORE: Your Honor, all I ask is the name be  
19 redacted to change to John Doe.

20 THE COURT: Ms. Brymer, wherever the name of John or  
21 Doe appears substitute John Doe for John Doe.

22 MS. MOORE: Your Honor, given the history, I would  
23 also ask everyone present in the courtroom be directed that  
24 they not advise anyone the John Doe referenced in the document  
25 is my client.

1 MR. LERNER: That's fine.

2 THE COURT: Ms. Moore, there is I think an extent  
3 even to which the broad enormous powers of Federal Courts do  
4 not extend and I think the limit to which you're requesting  
5 that power be extended is beyond the borders of Federal Court  
6 power, which is quite enormous, but if exercised carelessly  
7 can be quite inappropriate. I'm not directing the court or  
8 the world at large with respect to this proceeding, John Doe  
9 or everybody here.

10 It seems to me that in addition to purely legal  
11 issues there are issues of professional responsibility which  
12 are quite significant. There may be some DR, disciplinary  
13 rule, with respect to the obligation of attorneys regarding  
14 the use of documents which are marked sealed, whatever they  
15 may be. Whether that would provide a basis for injunctive  
16 relief or not I don't know. It is a matter which may be  
17 explored. I suppose if one thinks imaginably one may think of  
18 a lot of reasons why an order may or may not be issued  
19 providing for injunctive or other relief. With respect to the  
20 last request you made it is denied.

21 Anything further?

22 (No response.)

23 THE COURT: I'll see you -- or if you want oral  
24 argument -- I guess you do. So, one week for a briefing from  
25 you, Ms. Moore, one week thereafter from you, and why don't we

1 set it down for further oral argument a week thereafter.

2 Whatever those dates are.

3 Can you give me some dates? Today is the 21st. So,  
4 the 28th from you. Seven days thereafter, what day is that?

5 THE CLERK: The 5th, which is a holiday.

6 THE COURT: 6th of July, that's going to spoil  
7 somebody's Fourth of July weekend. We can extend it another  
8 day or two. Give me a number.

9 MR. LERNER: July 9th, Friday.

10 THE COURT: You've gotten the two weeks you asked me  
11 for.

12 Do you want another week, Ms. Moore?

13 MS. MOORE: No.

14 THE COURT: Give me a date for oral argument. 28th  
15 of June for Ms. Moore, July 9th for Mr. Lerner and give me an  
16 oral argument date. What day of the week is July 9th?

17 THE CLERK: Friday.

18 THE COURT: Why don't we put it down for oral  
19 argument the following Friday, which would be the 16th of  
20 July. Okay.

21 Am I interfering with somebody's vacation? July  
22 16th. Okay. We're finished today. Thank you very much.

23 MR. LERNER: Your Honor, would it be possible to  
24 make the oral argument on the Tuesday of the following week,  
25 which would be the 20th?



1 THE COURT: Is that date all right?

2 MS. MOORE: Fine, your Honor.

3 THE CLERK: 10:30.

4 MR. LERNER: 10:30, your Honor. Thank you.

5 (Proceedings concluded.)

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